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NO. 89-1896

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

AVONDALE SHIPYARDS, INC.
Petitioner

versus

CHESTER J. ORGERON, JR. and
his wife, CONNIE E. LYNN CAMUS ORGERON
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF LOUISIANA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI ON A QUESTION ALREADY AUTHORITATIVELY DECIDED BY CONGRESS.

II. WHETHER THE DECISION OF THE LOUISIANA SUPREME COURT IS IN CONFLICT WITH DECISIONS OF FEDERAL APPELLATE COURTS AND THIS COURT.

III. WHETHER THE DEFINITION OF VESSEL SET FORTH IN 1 U.S.C. §3 OR IN JONES ACT CASES UNDER 46 U.S.C. §688 GOVERNS THE ISSUE OF VESSEL STATUS UNDER SECTION 905(B) OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT, 33 U.S.C. §905(B).

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IN THE
SUPREME COURT OF THE UNITED STATES
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AVONDALE SHIPYARDS, INC.
Petitioner

VERSUS

CHESTER J. ORGERON, JR., and
his wife. CONNIE E. LYNN CAMUS ORGERON
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

DECISIONS BELOW

1. August 31, 1988, decision by trial court in favor of defendant (Petitioner's Appendix C).

2. April 12, 1989, decision by Louisiana Court of Appeal, Fifth Circuit, affirming trial court (542 So. 2d 640) (Petitioner's Appendix D).

3. February 5, 1990, decision by Louisiana Supreme Court, reversing and remanding for determination of vessel negligence issue (556 So.2d 582) (Petitioner's Appendix A).

4. March 8, 1990, denial of petition for rehearing by Louisiana Supreme Court (Petitioner's Appendix B).

STATEMENT OF THE CASE

Chester Orgeron, Jr., while working as a ship repairman for Avondale Shipyards, Inc., was seriously injured on the night of September 9, 1983, when he fell between an opening in two work barges. The barges at the time were afloat in navigable water alongside the No. 4 drydock in Avondale's Harvey Quick Repair Yard. The yard is in a slip in the Harvey Canal, which is part of the Intracoastal Waterways.

Orgeron brought this negligence action against Avondale Shipyards, Inc., under the provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §905(b). Plaintiff claimed Avondale's negligence was its failure to equip the barges with securing equipment to permit them to be secured together.

Under section 905(b), Orgeron, since he is a covered employee under the LHWCA, can sue for the "negligence of a vessel" even though the owner of the vessel was his employer. *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 103 S.Ct. 2541 (1983). The injury must, in part at least, be attributable to Avondale in its capacity as vessel owner. *Edmonds v. Compagnie Generale Transatlantigue,* 443 U.S. 256, 99 S.Ct. 2753, 2759 (1979).

The wording of section 905(b) of the Act in effect at the time of Orgeron's injury, and applicable to the present case, was as follows:

> In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provision of Section 33 of this Act, and the employer shall not be liable to

> the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injuries were caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel.

In 1984, Congress amended section 905(b) to prohibit suits against a ship repairer vessel owner who is also the plaintiff's employer. Since this amendment applies only to injuries after September 28, 1984, it is not controlling here since the plaintiff was injured on September 9, 1983.

The above-quoted language of section 905(b), in effect at the time of Orgeron's accident, provides generally that a ship repairer or other maritime employee cannot sue his employer for the employer's negligence, but can sue the owner of a vessel whose negligence causes his injury. A special case occurs, however, when the employer is also the owner of the involved vessel. In such a case, the courts have recognized the "dual capacity" doctrine. The employer is immune from suit in its capacity as employer, but *is not immune if it was negligent in its role as vessel owner.* The employer/vessel owner is treated just as any other vessel owner. *Chiasson v. Rogers Terminal & Shipping Corp.*, 679 F.2d 410 (5th Cir., 1982); *Smith v. M/V Captain Fred*, 546 F.2d 119 (5th Cir. 1977). The rationale in *Smith* and subsequent cases is that an employee should not be "treated differently solely because the ship on which he is injured happens to be owned by his employer instead of by a third party."

Avondale defended on two grounds. Their first contention was that the work barges (or pontoons) were not vessels under 33 U.S.C. §905(b). Alternatively, Avondale urged that if the work barges (or pontoons) were vessels, then they were not negligent in their capacity as vessel owner.

The trial judge found that the barges were not vessels, applying a Jones Act, 46 U.S.C. §688, "design and use" test of vessel status to this non-Jones Act case. Judgment was entered in favor of Avondale Shipyards, Inc., and against the plaintiffs. (Petitioner's Appendix C at 2.)

The Louisiana Fifth Circuit Court of Appeal affirmed the lower court judgment on the basis that the work barges were not vessels under the Jones Act test. *Orgeron v. Avondale Shipyards, Inc.*, 542 So.2d 640 (La. App. 5th Cir. 1989). (Petitioner's Appendix D).

In its writ application to the Louisiana Supreme Court, plaintiff raised one issue only: whether the Court of Appeal committed legal error by holding that the Avondale work barges (or pontoons) were not vessels and by holding that the correct vessel test under section 905(b) was the Jones Act test instead of the "capability" test provided by 1 U.S.C. §3.

§3. "Vessel" as including all means of water transportation

> The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.
> (July 30, 1947, ch 388, § 1, 61 Stat. 633.)

The Louisiana Supreme Court reversed, holding that the proper test of vessel status under section 905(b) was that provided in 1 U.S.C. §3, the "capability" test, and not that applied to Jones Act cases, the "design and use" test,

and that the barges in question were vessels under 1 U.S.C. §3. *Orgeron v. Avondale Shipyards, Inc.*, 556 So.2d 582, 585 (La. 1990) (Petitioner's Appendix A at 6-7).

The purpose of the Avondale Shipyard facility is the repair of vessels. Vessels to be repaired are placed on dry docks. When the vessels are raised on the dry dock, the bottom portion of the hull of the vessel, including the wheels, (or propellers) and rudders are removed and taken to the machine shop. To assist in the repair work, Avondale designed and built the work barges in question. R. at 291-292.

These barges are free-floating. R. at 294. They move over the water all around the yard. R. at 294. They are used to carry heavy equipment, including anchors and propellers, around the yard. R. at 292. When moving around the yard in the Harvey Canal they will sometimes have the workers' tools and equipment on them. R. at 297. The work barges (or pontoons) are used between the land dock and the dry dock and also on the Canal side of the Harvey Canal. R. at 331, 342.

The work barges had numerous other uses at the facility besides serving as work platforms. When the work barges were used on the Canal side of the facility, they would carry equipment from the boats on dry dock to the machine shop. R. at 247. The work barges travelled from one end of the yard to the other. R. at 264-265. Employees would ride on these barges when moved. R. at 252-253. They moved their equipment to the work site on these barges and they rode on them when the barges carried wheels and shafts to make certain that they would not fall off into the Harvey Canal. R. at 252-253. Shift boats on occasion would move the barges by tying up alongside them. R. at 253.

Sometimes the barges would break loose, since they were free-floating and not permanently attached to anything, and drift into the middle of the Harvey Canal. R. at 253. This was as a result of the mooring lines giving way. R. at 253. The barges would then have to be retrieved. R. at 254.

As many as five men have ridden on these barges when in movement. R. at 257. Mr. Orgeron oftentimes rode on the barges while they were being moved. Life vests were required during this time. R. at 352.

ARGUMENT

THE QUESTION HAS ALREADY BEEN DECIDED AUTHORITATIVELY BY CONGRESS

The dispute involved in this case has already been settled by Congress in the 1984 amendment to section 905(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §905(b), effective as of September 28, 1984. The amendment provides that only longshoremen may sue their employers as vessel owners under this section and that ship repair and building employees may no longer do so. This case involves a ship repair worker and could not arise again after 1984. Therefore, there is no reason for this Court to issue its writ to decide an issue already decided by Congress. This would not be a proper use of the writ of certiorari. The point is: there is no longer a significant legal problem to be resolved.

It is of the very nature of a work platform case such as this that it involves a structure used in ship repair and building cases — not other types of cases. This is the very reason why Congress in 1984 eliminated dual capacity suits against employers in repair and building cases but not in longshore cases. Congress did not want ship owners

to load and unload their own ships and thus avoid section 905(b) obligations by this convenient device. This is likely to happen in a longshoring context, but not in other contexts. It is not a likely practice, for instance, that shipowners will go into the ship repair or ship building business just to avoid such obligations. This would not be a feasible business undertaking in the same way it might be to hire a gang of men to load or unload a ship.

Petitioner argues that the question of the correct definition of a vessel in section 905(b) cases, even after 1984, will affect a large, mysterious group of workers in harbor worker occupations other than those in the ship repair and building industries. Petition at 5-8, note 1; 15-16. The only group under the 1984 amendment which may expressly bring section 905(b) dual capacity suits today are longshoremen. The great classes of harbor workers, as illustrated in the LHWCA itself, 33 U.S.C. §902(3), are longshoremen, ship repairers and ship builders and breakers. Respondent submits that the number of cases involving harbor workers not falling into these categories who might be injured by the negligence of a work platform owned by their employer under general admiralty jurisdiction will be, at best, minuscule. Surely these workers are not commonly reflected in the case law. Congress has clearly addressed the question of dual capacity suits in the 1984 amendment to section 905(b) and has, by the very fact that it has expressly addressed the major classes of harbor workers only, indicated its belief that any other workers are simply not numerous enough to justify direct mention. This should also govern considerations concerning certiorari.

Surely it would be more appropriate to wait for the unlikely event that a non-repair, non-building work platform case will arise after the 1984 amendment. This is advisable for two reasons: it is likely that this will never hap-

pen; and the case would be in a concrete non-repair context and thus much more appropriate than the present case for Supreme Court action. It is beyond question, and even petitioner must admit this, that today, *i.e.*, after 1984, this case, dealing as it does with a ship repair worker suing his employer as vessel owner, could not arise again. There simply is no important issue of federal law to decide that has not already been authoritatively decided by Congress.

THE DECISION OF THE LOUISIANA SUPREME COURT IS NOT IN CONFLICT WITH DECISIONS OF UNITED STATES COURTS OF APPEALS OR THIS COURT

Petitioner states that two of the considerations mentioned in the Supreme Court Rules, Rules 10.1 (b & c) (incorrectly identified by petitioner as 17.1(b) & (c)), favor the granting of certiorari in this case. The first consideration is a conflict between state and federal courts on the proper vessel definition under section 905(b) and the general maritime law. The second consideration is a conflict between the state court and this Court on an important issue of federal law, the vessel status test issue. Petition at 10-13.

The decision of the Louisiana Supreme Court in this case does not apply a test for vessel status contrary to that established under federal general maritime law. Rather the Louisiana Supreme Court decided that the federal general maritime law test under section 905(b) is that found in 1 U.S.C. §3. This conclusion was reached after a thorough analysis of the relevant *federal* jurisprudence on point. Therefore, there is no conflict between the state and federal courts to justify the writ of certiorari in this case. Supreme Court Rule 10.1(b). Thus, petitioner's statement that the federal courts have applied a general maritime law test, whereas the Louisiana Supreme Court applied a statutory

test different from the general maritime law test of vessel status, is not true. What the Louisiana Supreme Court did do was to hold, in full accordance with the federal jurisprudence, that 1 U.S.C. §3 *is the general maritime law test.* This was common knowledge at the admiralty bar before petitioner suggested the contrary. The petitioner says that '[t]he Louisiana Supreme Court viewed its task not as deciding whether the pontoons are vessels under the general maritime law, but as whether the pontoons are vessels under section 5(b) of the LHWCA." Petition at 9. Obviously the court viewed its task as interpreting section 905(b): this case involves a section 905(b) claim. but the state court fully understood that the test under section 905(b) is that which prevails under the general maritime law. Contrary to what petitioner asserts Petition at 13-14, the Louisiana Supreme Court opinion clearly shows that the negligence action under section 905(b) arises under general maritime law and must satisfy the jurisdictional (*Executive Jet)*[1] and vessel (1 U.S.C. §3) requirements of that law. 556 So.2d at 586-587. This was clearly pointed out by the United States Court of Appeals for the Fifth Circuit in its 1987 *en banc* decision in *Richendollar v. Diamond M. Drilling Co.,* 819 F.2d 124 (5th Cir.) (*en banc*), *cert. denied*, 484 U.S. 944, 108 S.Ct. 331 (1987). *Richendollar* also clearly applied 1 U.S.C. §3 to the question of vessel status under the general maritime law and 905(b), and not the Jones Act design and use test. 819 F.2d at 125. The Louisiana

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1. In the case of *Executive Jet Aviation v. City of Cleveland,* 409 U.S. 249, 93 S.Ct. 493 (1972), this court decided that the standard of general maritime tort jurisdiction is locality plus a relationship between the involved activity and traditional maritime activity. In addition to locality there must also be a maritime subject matter before a tort is held to be maritime in nature.

Supreme Court clearly did the same and held that 1 U.S.C. §3 supplies the definition of a vessel under the general maritime law (in other than seamen cases) and therefore under section 905(b). 556 So.2d at 587-588.

The only misunderstanding here is attributable to petitioner. The basic misunderstanding betrayed by this attempt to create a conflict between state and federal jurisprudence is illustrated by the constant citation to Jones Act cases or mixed cases (involving both the Jones Act and section 905(b)), to illustrate use of the design and use test. Petition at 9,11,13,16,18. This begs the question because the question is: does this design and use test apply in a non-Jones Act - general maritime law - 905(b) action? This question, of course, cannot be addressed by showing its application in Jones Act cases, or in mixed cases to the Jones Act question only.

Since the decision of the Louisiana Supreme Court in this case does not conflict with federal appellate precedent, the same result should have obtained had this case been filed in federal court. As previously mentioned, the federal cases which have applied the design and use test of vessel status are solely Jones Act cases, *Bernard v. Binnings Construction Co., Inc.*, 741 F.2d 824 (5th Cir. 1984), or are cases dealing with both §905(b) and the Jones Act in which the design and use test is applied to the Jones Act question only. *Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 877 F.2d 393 (5th Cir. 1989).

The United States Courts of Appeals have applied 1 U.S.C. §3 to determine vessel status in Longshore Act cases on various occasions. The capability test (1 U.S.C. §3) has been expressly and consistently applied in these cases. *Richendollar v. Diamond M. Drilling Co.; Hall v. Hvide Hull No. 3*,746 F.2d 295, 296-298 (5th Cir.), *cert. denied*, 474 U.S. 820, 106 S.Ct. 69 (1984), *McCarthy v. The Bark Pek-*

ing, 716 F.2d 130, 134, 135 (2d Cir.), *cert. denied* 465 U.S. 1078, 104 S.Ct. 1439 (1984); *Burks v. American River Transportation Company*, 679 F.2d 69, 75 (5th Cir. 1982).

These cases represent the jurisprudence of the United States Courts of Appeals for the Fifth and Second Circuits. In each case the capability test of 1 U.S.C. §3 was expressly stated to be applicable and was, in fact, applied to the issue of vessel status under the LHWCA. In *none* of these cases (other federal cases could be cited on this point) was the Jones Act design and use test applied to the vessel question under the LHWCA. In response to this consistent federal jurisprudence, petitioner can only cite to Jones Act cases (and, of course, the Jones Act test was applied to the Jones Act) and to district court cases which cannot survive the federal appellate jurisprudence referred to above.

Since there is no conflict between the Louisiana Supreme Court decision in this case and relevant federal jurisprudence, petitioner need have no fear of the spectre of forum shopping and disruption of the uniformity of maritime law which it rightly holds in such high esteem. Petition at 11-12.

Petitioner's confusion is obvious in its statement of the first question presented for review, which is stated as follows:

> **I. WHETHER, IN A GENERAL MARITIME LAW VESSEL NEGLIGENCE ACTION BROUGHT IN STATE COURT, THE LOUISIANA SUPREME COURT MAY ADOPT AND APPLY A TEST FOR VESSEL STATUS CONTRARY TO THE TEST FOR VESSEL STATUS ESTABLISHED BY FEDERAL GENERAL MARITIME LAW. p. i.**

Of course, the state court cannot adopt a test contrary to the federal test. No one has ever suggested that it could lawfully do so, least of all the Supreme Court of Louisiana. Petitioner's statement of the question is a complete *non sequitur.* A sample reading of the opinion of the Louisiana Supreme Court reveals that that court was attempting to follow federal precedent. 556 So.2d at 585-587. Even if the court had failed in this endeavor, and had failed to correctly interpret the federal precedent, which is not the case, this would still not raise the question stated by petitioner as a ground for issuance of the writ of certiorari. Petitioner is trying to bootstrap itself into a writ of certiorari by turning a disagreement with the Louisiana Supreme Court's interpretation of federal law into a refusal by that court to follow the federal law. This is not true. There is absolutely no ground here to justify the issuance of the writ.

Petitioner has attempted to create such a clash between state and federal precedent by mere assertion. For instance, petitioner says that the United States Court of Appeals for the Fifth Circuit, between the Louisiana Court of Appeal and Supreme Court decision in this case, decided the case of *Ducrepont, Supra,* which "held that a floating barge used as a work platform and adjunct to a drydock is not a vessel." Petition at 9. Petitioner would suggest that the Louisiana Supreme Court refused to follow *Ducrepont.* This is absolutely false.

A mere perusal of the Louisiana Supreme Court opinion in this case indicates that that court interpreted *Ducrepont* and followed it. 556 So.2d at 587. The petitioner's problem is that the Louisiana Supreme Court interpreted *Ducrepont* to mean something completely different then petitioner would like it to mean under the above quotation. The Federal Fifth Circuit simply did not say in

Ducrepont what petitioner says that it said. But this is a question of merit. It is not a debatable question, however, that the Louisiana Supreme Court followed (or at least attempted to do so) the *Ducrepont* case and all other relevant federal cases.

The only conflict here is between the Louisiana Supreme Court and petitioner.

Nowhere in the opinion of the United States Court of Appeals for the Fifth Circuit in the *Ducrepont* case is there any statement or inference that the tests are the same for section 905(b) and the Jones Act. Quite the contrary is the case. Not only is there no rejection of the district court's holding that the tests are not the same, but the structure of the opinion (and this is mentioned by the Louisiana Supreme Court in the present case, 556 So.2d at 587) unquestionably shows an implicit acknowledgement on the federal court's part that there are separate tests. If the tests were the same, then the *Ducrepont* court's holding that the platform was not a Jones Act vessel would have made unnecessary the discussion of section 905(b) vessel status, which is *separately* discussed and ruled upon by the court using the 1 U.S.C. §3 test. 877 F.2d at 395-396.

In its separate discussion of the section 905(b) vessel question, the *Ducrepont* court does not mention *Bernard* or any other Jones Act cases, which had been mentioned consistently throughout its previous Jones Act discussion. 877 F.2d at 395-396. There is no mention in the section 905(b) portion of the opinion of any "design and use" test. Jones Act cases were cited by the court in resolving the Jones Act issue. 877 F.2d at 395. On the *separate* section 905(b) issue only *Burks* (LHWCA case), 1 U.S.C. §3, *Davis*

v. Cargill, Inc. 808 F.2d 361 (5th Cir. 1986), (section 905(b) case) and *Richendollar* are referenced, 877 F.2d at 395-396. Thus, *Ducrepont,* in spite of what petitioner would have us believe, *again* establishes that different tests are involved.

In addition, the factual holding of *Ducrepont* certainly does not apply in this case. The work barges here involved were not "permanently moored platforms." As discussed in the Statement of the Case, *supra,* the barges here were used throughout the Avondale facility in the Harvey Canal. They were free-floating at all times and never permanently moored. They carried men and equipment during movement and were used for a variety of tasks in the Harvey Canal. They were moved constantly. Accordingly, the factual finding of *Ducrepont* to the effect that the structure was "firmly moored" and "seldom moved" is not applicable to the present case. 877 F.2d at 396.

Petitioner seems to think that there is some magical force raised by insisting that the Louisiana Supreme Court in this case adopted a "statutory"test for vessel status. Petition at 9,13,14. If petitioner means that the court applied a statute, 1 U.S.C. §3, then of course the point is correct. But petitioner seems to mean that in so doing the state court failed to apply a test suitable to the "general maritime law" phrase which petitioner would also endow with magical powers.

What petitioner has attempted to do is to argue that, since the United States Court of Appeals for the Fifth Circuit held in its *en banc* decision in *Richendollar* that section 905(b) preserved the pre-existing negligence action available under the general maritime law (by applying the general maritime law jurisdictional standard of locality - plus a traditional maritime activity (*Executive Jet* standard) to 905(b) actions), 819 F.2d at 126-127, that in some magical way this changed the pre-existing definition of a

vessel under the general maritime law (1 U.S.C. §3). Petitioner's argument is apparently a simplistic one to the effect that a "statutory" standard cannot apply to the question of vessel status under the general maritime law. Petitioner never expressly tells us why this is the case. The only explanation that is even suggested is because general maritime law is judgemade law and statutes are passed by Congress. Petition at 14. If this is petitioner's point, then it really is simplistic. Congress may certainly apply a statutory definition to questions that arise under the general maritime law. To stigmatize these as "statutory" is to state the obvious, and also to make no sensible point at all. And, of course, to point to the *en banc Richendollar* case as supportive of petitioner's argument is to add insult to injury. *Richendollar* held that a section 905(b) action arose under the general maritime law and required locality - plus a maritime connection jurisdictionally. 819 F.2d at 126, 127. In addition, *Richendollar* expressly cited, quoted, and applied 1 U.S.C. §3 to the question of vessel status under section 905(b)-general maritime law. 819 F.2d at 125 note 2.

Petitioner argues that the United States Court of Appeals for the Fifth Circuit in *Richendollar* "clearly held" that the "use of a statutory definition of a vessel in a section 5(b) case is inappropriate. 819 F.2d at 126." Petition at 14. What one finds on referring to page 126 of the reported case is that the only statutory definition of vessel rejected in *Richendollar* is that found in the LHWCA itself, 33 U.S.C. §902(21), which had been used to hold that a hull under construction on land was a vessel under the Act, a holding that is obviously imcompatible with the locality - plus maritime subject matter jurisdictional test of the general maritime law after *Executive Jet*. 819 F.2d at 126. By clearly implying that *Richendollar* was referring to 1 U.S.C. §3, petitioner is simply not telling the truth.

Petitioner is attempting to bootstrap an innocent appellate jurisprudence, *Richendollar, Ducrepont,* etc., into something revolutionary for the defense. But this is all coming from petitioner's self-serving assertions, not from these cases.

In any case, it must be kept in mind that in 1972 Congress amended the LHWCA and in doing so utilized the term "vessel" *statutorily* in section 905(b). Thus, it is quite proper to apply the definition of the United States Code to this statutory use even though the action preserved arises under the general maritime law. Section 905(b) is a statute and the term vessel does appear in it. All that is intended by stating, as *Richendollar* does, that this section preserved the action under the general maritime law, is that the general tort jurisdictional criterion, locality-plus a maritime connection, must be satisfied and other aspects of the general maritime law must be complied with; also, that no new, additional cause of action was created in 1972.

There is also no conflict between the decision of the Louisiana Supreme Court and this Court, contrary to what petitioner asserts. Supreme Court Rule 10.1(c). Petition at 12-13. The Supreme Court case that petitioner refers to as establishing the Jones Act test as the general maritime law test, *The Robert W. Parsons,* 191 U.S. 17, 24 S.Ct. 8 (1903), is not even a tort case. It is a contract case in which the question was whether the activity involved, pulling a barge (or special purpose structure) with horses, was a maritime activity sufficient to provide a maritime subject matter. *Parsons* was concerned with whether a contract having to do with that operation was a maritime contract, the breach of which would give rise to a maritime lien. In that sense, *Parsons* was relevant to the issue of locality plus nexus, *i.e.,* the maritime activity question under *Executive Jet. Richendollar* cited *Parsons* for this proposition since *Richendollar* held that *Executive Jet* applied to section

905(b). This is the relevance of *Parsons* to tort cases. Both the contract standard of jurisdiction and the tort maritime nexus standard deal with the existence of maritime subject matter, *i.e.*, maritime activity. *Parsons* was an early case dealing with a special purpose craft in a contract-lien context.

Against all the non-Jones Act federal appellate authority discussed above, petitioner would rely heavily on *Parsons* and particularly on *Richendollar's* very brief reference to the *Parsons* case. The reference is found in the *Richendollar* court's discussion under the heading of "*Jurisdiction*," that is, the discussion in the opinion attempting to determine whether there is a maritime subject matter (*Executive Jet's* nexus), *i.e.*, whether there is a vessel for purposes of the subject matter of the basic contract jurisdictional criteria. 819 F.2d at 127.

As noted earlier, the *Richendollar* court, in the opening paragraph of its opinion, expressly set forth the capability test. The only relevance of the *Parsons* citation is to illustrate that special purpose watercraft can satisfy the nexus jurisdictional requirement if they are on navigable waters (the locality jurisdictional requirement). The court, in citing *Parsons*, was simply stating the law that the fact that a special purpose vessel (a jack-up drilling rig) was involved in *Richendollar* would not disqualify the structure from vessel status. The paragraphs immediately before and after the *Parsons* reference clearly indicate that this was the case. 819 F.2d at 127.

To take the *Parsons* reference out of context and urge that it was meant as a basic restatement that the Jones Act (which is not at all involved) definition of a vessel has been substituted for the capability definition, just cited and expressly applied several paragraphs before, is a complete *non sequitur*.

The *Parsons* case is cited in Jones Act cases because the design and use test is rightly applied in such cases and the courts have used the quotation from this contract *subject-matter* case to state the design and use test. *Parsons* was quoted in *Richendollar* (a section 905(b) case) for another purpose entirely, as discussed above. *Parsons* is not cited for the design and use test in non-Jones Act-non-unseaworthiness-general maritime law-section 905(b) cases.

Also, the later United States Supreme Court case of *Norton v. Warner Co.*, 321 U.S. 565, 64 S.Ct. 747 (1944), expressly applied 1 U.S.C. Sec. 3 to the LHWCA, 321 U.S. at 571, 64 S.Ct. at 751, and would control the question of vessel definition under that statute over the earlier non-LHWCA *Parsons* case.

THE DEFINITION OF VESSEL SET FORTH IN 1 U.S.C. §3 AND NOT THE JONES ACT DEFINITION GOVERNS THE ISSUE OF VESSEL STATUS UNDER SECTION 905(B) OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

The second question presented for review stated by petitioner, Petition at i, also misstates the substance of what is involved in the present case in the context of relevant jurisprudence. Petitioner states the question as follows:

> **II. WHETHER THE GENERAL MARITIME LAW TEST FOR VESSEL STATUS AS SET FORTH IN *THE ROBERT W. PARSONS*, 191 U.S. 17, 24 S. CT. 8 (1903) AND ITS PROGENY, OR THE STATUTORY DEFINITION OF VESSEL AS SET FORTH IN 1 U.S.C §3, GOVERNS THE ISSUE OF VESSEL STATUS IN THE GENERAL MARITIME LAW CAUSE OF ACTION FOR VESSEL NEGLIGENCE PRESERVED BY SECTION 5(B) OF THE LONGSHORE AND HARBOR WORKER' COMPENSATION ACT, 33 U.S.C. §905 (B).**

The point has to be made that the general maritime law test for vessel status (excluding seaman cases) is 1 U.S.C. §3. It is not a matter of the general maritime law test versus the test set forth in the United States Code. The real question involved in this case, contrary to the statement of question II set forth above, is whether the Jones Act - seaman test or 1 U.S.C. §3 (the general maritime law test) is the proper test under section 905(b) - general maritime law. The mere statement of the question, of course, suggests the correct answer.

Petitioner raises the question of whether the test of vessel status is the same for §905(b) and Jones Act actions, but fails to cite one single appellate case which, upon examination, expressly holds that the tests are the same - design and use. Respondent, on the other hand, does cite cases from the United States Courts of Appeals which *expressly hold* that the tests are not the same and that the section 905(b) test is that found in 1 U.S.C. §3. *Hall; McCarthy.*

On page 16 and 17 of the petition for writ of certiorari, petitioner cites eight cases as purportedly establishing that the same test applies under §905(b) and the Jones Act. Strangely enough, petitioner fails to cite *Hall* and *McCarthy* in which the United States Courts of Appeals for the Fifth and Second Circuits expressly held just the opposite. But of the cases which petitioner does cite, two may be dismissed because they are Jones Act cases (this is what petitioner means by saying "seaman's case" in parentheses following the citations) and for reasons given hereafter are not relevant (a 905(b) worker is *defined* as a non-seaman). *Bernard; Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999 (5th Cir.), *cert. denied*, 414 U.S. 868, 94 S.Ct. 175 (1973). Of the two section 905(b) appellate cases that are cited, *Richendollar*, contrary to what is suggested, expressly applied 1 U.S.C. §3 to the sec-

tion 905(b) vessel status question. 819 F.2d at 125: and the other section 905(b) case, *Davis v. Cargill, Inc.*, 808 F.2d 361 (5th Cir. 1986), was a permanent attachment to land case which found the platform not "capable" of transportation because of the attachment. 808 F.2d at 362. *Atkins v. Greenvile Shipbuilding Corp.*, 411 F.2d 279 (5th Cir.), *cert. denied*, 396 U.S. 846, 90 S.Ct. 105 (1969), was also a permanent attachment - not capable case and pre-dated the existence of section 905(b). 411 F.2d at 283. The remaining three cases, all federal district court decisions, cannot survive the appellate federal jurisprudence applying 1 U.S.C. §3 to section 905(b).

The Louisiana Court of Appeal decision in this case is the only appellate decision in the United States that is known to respondent that has expressly stated that the same test applies in section 905(b) and Jones Act cases.

In sum, two federal circuits, the Fifth Circuit, *Hall*, and the Second Circuit, *McCarthy*, both dealing specially with the definition and test of vessel status under section 905(b), have *specifically* and *expressly held* that different tests must be applied to the questions of vessel status in Jones Act cases, on the one hand, and in section 905(b) cases, on the other. *Hall* at 746 F.2d at 295, footnote 10; *McCarthy* at 716 F.2d at 134, footnote 2. Both cases were cited by the Louisiana Supreme Court in this case.

Various cases from the United States Courts of Appeals have expressly applied 1 U.S.C. §3 to the vessel question under the LHWCA. *Richendollar; Hall; Burks; McCarthy.*

All cases which suggest a different test are either Jones Act cases, *Bernard*, or cases which are both Jones Act and 905(b) cases in which the different test was applied separately and solely to the Jones Act question. *Ducrepont.*

It should be observed that none of these cases, *Hall, Burks, McCarthy, Richendollar,* etc., discuss any requirement that the waterborne structure be "in navigation." And none of these cases refer to any "design and use" test.

Several section 905(b) cases have failed to find a structure to be a vessel because the capability test of 1 U.S.C. §3 was not satisfied due to the permanent attachment of the structure to the land. *Davis.* These cases *do not* stand for the proposition that 1 U.S.C. §3 does not apply to section 905(b) cases; rather, each case applied 1 U.S.C. §3 and found that, *because of the permanent attachment of the structure to the land,* it did not satisfy the "capability" test of 1 U.S.C. §3. *Davis.*

The Jones Act requires that the worker be a seaman, a crew member of a vessel in navigation. *Offshore Co. v. Robison,* 266 F.2d 769, 779 (5th Cir. 1959). In Jones Act and unseaworthiness (which also requires that a seaman be a crew member of a vessel in navigation) cases the workers are only "seaman" if the vessel is in navigation. Thus, "in navigation" is an absolute requirement for seaman status under the Jones Act. *Reynolds v. Ingalls Shipyards,* 788 F.2d 264 (5th Cir.), *cert. denied,* 479 U.S. 885, 107 S.Ct. 278 (1986). It is not a requirement for section 905(b), nor for any portion of the general maritime law other than cases of unseaworthiness. It is certainly *not* a requirement in this case where plaintiff is not a seaman but a ship repairer covered by the LHWCA. *Hollister v. Luke Construction Co.,* 517 F.2d 920 (5th Cir. 1975); *Williams v. Avondale Shipyards, Inc.,* 452 F.2d 955 (5th Cir. 1971); *Reynolds.*

The *Bernard* case and the other Jones Act cases relied upon by petitioner and the Louisiana Court of Appeal are totally irrelevant on the vessel question in this section 905(b) case. How could they be relevant? *Bernard* found that the structure was not "in navigation," 741 F.2d

at 831-834, and, thus, would not satisfy the Jones Act vessel requirement. Obviously, when it is required that the structure be in navigation, then the question of whether it was "designed or used" for navigation is highly relevant. On the other hand, when it is *not* required that the structure be in navigation, as in the present case, then it is wholly unwarranted to apply a "design and use *for navigation*" test.

It should be obvious that if a vessel has to be 'in navigation" for Jones Act and unseaworthiness claims, then the basic definition of the vessel is going to be *something more* than is required for a vessel under either section 905(b) or the locality and nexus criteria for admiralty tort jurisdiction. The basic reason why vessels must be in navigation to achieve seaman status is that seamen do their work on vessels in navigation, not just on vessels merely "capable" of navigation. Seamen, as opposed to other types of maritime workers, such as section 905(b) workers, contribute in some way to the navigation or functioning of vessels — this is what they classically do; this is their basic occupation. Thus vessels on which seamen, as opposed to other maritime workers, work fall quite logically under a "design and use" standard. It is not, however, logical to require that a repair worker, like Mr. Orgeron in this case, establish that the vessel be in navigation before he may bring a section 905(b) third party action. Clearly such a repair worker would often work on vessels not in navigation. *West v. United States,* 361 U.S. 118, 80 S.Ct. 189 (1959).

Longshoremen and harbor workers perform their functions aboard vessels both in and out of navigation. The two classes of workmen are so different that persons covered by the Jones Act are even determined by defining the meaning of the exclusion of "members of the crew" in the LHWCA. 33 U.S.C. §902(3)(g); *Pizzitolo v. Electro-Coal*

Transfer Corp., 812 F.2d 977, 982-983 (5th Cir.), *cert. denied*, 484 U.S. 1059, 108 S.Ct. 1013 (1988). A section 905(b) worker and a Jones Act seaman are polar opposite types of workmen.

The vessel status test under the Jones Act and section 905(b) are different because, under the former, we must ask whether the workman is a crew member, that is, does he work aboard a vessel (or vessels) in navigation in some more or less permanent fashion. *Robison*, 266 F.2d at 779; *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1072-1073 (5th Cir. 1986) *en banc*. This is precisely the opposite question from the one we ask under the LHWCA. Under the latter we ask whether the worker is *not* a crew member. If an employee is covered by the LHWCA, such as petitioner in this case, he is automatically excluded from claiming benefits under the Jones Acts and the unseaworthiness doctrine, and vice versa. *Pizzitolo*.

Different standards govern the Jones Act (and unseaworthiness) and the LHWCA. This was noted by the Louisiana Supreme Court in this case. 556 So.2d at 585. The standard of negligence and contributing negligence is different under the two statutes. *Brooks v. Great Lakes Dredge-Dock Co.*, 754 F.2d 539 (5th Cir. 1985). Only slight duties of conduct apply under the Jones Act. *Savoie v. Otto Candies, Inc.*, 692 F.2d 363, 371-372 (5th Cir. 1982). Reasonable care is the standard under the LHWCA, *De Los Santos v. Scindia Steam Navigation, Co.*, 451 U.S. 156, 101 S.Ct. 1614 (1981), and the general maritime law (other than the strict liability of the unseaworthiness doctrine). Different standards of causation also apply. As mentioned elsewhere, it would be startling if the same definition of vessel applied, since the Jones Act (and unseaworthiness) and section 905(b) are so completely different in every other way and stand at opposite poles of the legal landscape.

Thus, when the federal appellate courts have questioned vessel status for purposes of the Jones Act they have applied a "design and use" test; when they have raised the question for purposes of the section 905(b) - general maritime law action, they have applied the 1 U.S.C. §3 test. There is no conflict. The United States Courts of Appeals are quite clear on the point, as discussed above. In case after case from these appellate federal tribunals, when the design and use test is applied, the courts will preface the applications with words such as "for Jones Act purposes," "under the Jones Act," etc., clearly indicating that the application is limited to this type of case. *Bernard*, 741 F.2d at 825; *Colomb v. Texaco, Inc.*, 736 F.2d 218, 221 (5th Cir. 1984); *Waguespack v. Aetna Life & Casualty Company*, 795 F.2d 523, 526 (5th Cir. 1986).

In some of the Jones Act cases the courts will indicate that the particular structure involved is "not a vessel for purposes of the Jones Act or general maritime law." *Cook*. The cases indicate that the reference here to "general maritime law" is a reference to the unseaworthiness doctrine only and not the general maritime tort action of the general maritime law that is involved in the section 905(b) negligence action. In fact, since the 1972 amendments to the LHWCA, longshoremen and harbor workers no longer can assert an unseaworthiness action against the vessel. Only seaman, covered by the Jones Act, can now, after 1972, urge the unseaworthiness action against the vessel owner. Longshoremen's and Harbor Workers' Compensation Act amendments of 1972. Pub. L. No. 95-576, 86 Stat. 125 LK-65 (amending 33 U.S.C. §901-950).

Petitioner would elevate these references to the general maritime law in non-section 905(b) actions to a position coterminous with all actions under general maritime law. But this cannot be because these references to the general maritime law are found in cases where the plain-

tiff's action is founded on the *Jones Act and unseaworthiness only* and not on general maritime tort or section 905(b). And these cases can have no relevance to cases such as the present because today section 905(b) workers *cannot* recover under either the Jones Act or that portion of the general maritime law termed unseaworthiness. Today, post 1972, section 905(b) cases and unseaworthiness (and Jones Act) cases are totally different. As mentioned above, a single workman could not fall into both categories. The categories are mutually exclusive. *Pizzitolo.*

In summary, it would be startling if the same test applied in Jones Act and section 905(b) general maritime law cases. The reasons for determining if a structure is a vessel in the two cases are completely different. The question is asked in Jones Act cases in order to determine if a worker is a crew member of a vessel in navigation. The worker in section 905(b) cases cannot be a crew member. If he were he would not be a harbor worker and thus not covered by section 905(b). Rather, he is a longshoreman or other harbor worker who does not - *by definition* - serve aboard vessels in navigation as a crew member. *Pizzitolo.* Also, the "vessel" in Jones Act cases must be "in navigation" because crew members only perform their crew duties aboard vessels in navigation. *Wixom v. Boland Marine & Mfg. Co., Inc.,* 614 F.2d 956, 957 (5th Cir. 1980).

It must be pointed out that the Louisiana Supreme Court, as well as finding that 1 U.S.C. §3 is the appropriate vessel status test under 905(b) and the general maritime law, also found that the vessels in question were also used for transportation and navigation, a *factual finding* amply supported by the evidence and record. 556 So.2d at 588. In other words, the Louisiana Supreme Court held *as a factual matter* that, if plaintiff did have to satisfy a design and use test in this case, he had done so. 556 So.2d at 588.

The vessels in the present case were obviously intended to move men and equipment from place to place on water ("designed" for this purpose) and they were used for this purpose. The test, even under the Jones Act, is not whether the vessel was intended to engage in maritime commercial transportation. If this were the test, then most of the craft routinely found to be Jones Act vessels under the design and use test could not qualify as such.[2] Rather, the test is whether the craft was intended to move over water from place to place in the regular course of its work use. *Brunet v. Boh Bros,* 715 F.2d 196, 198-199 (5th Cir. 1983). The vessels involved in the present case certainly, *according to the factual finding of the Louisiana Supreme Court,* satisfied this requirement. 556 So.2d at 588.

Petitioner asserts that the courts have even grafted upon the 1 U.S.C. §3 definition the requirement that the structure must be actually used in navigation and not only be capable of such use. Petition at 15. This is absolutely preposterous and a total misstatement of the case cited to support it. If this assertion were true, there would be no difference between the 1 U.S.C. §3 test and the Jones Act test and this entire controversy would be non-existent. If this assertion were true, then most of the structures found to be vessels under the federal jurisprudence would not qualify as such. The case cited to support this amazing assertion, *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.,* 271 US 19, 46 S. Ct. 379 (1926), simply does not

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2. This is why it is so startling to find petitioner stating that federal courts of appeals decisions on the vessel status issue have required "a floating structure. . .designed and used *primarily for navigation.*" Petition at 10 (Emphasis added). This would exclude most Jones Act vessels from vessel status. This is not even a correct statement of the Jones Act design and use test. Under petitioner's test "special purpose craft" could not qualify. For instance, movable drilling barges, long held to be vessels in navigation, *Robison,* would not qualify under such a test. Although this result might be to petitioner's liking, it certainly would not conform to federal jurisprudence on the question.

so hold and petitioner's statement that it does is untrue. In *Evansville* this court held that a wharfboat permanently attached to the shore and not intended to be moved about in the regular course of its employment was *not reasonably capable* in a 1 U.S.C. §3 sense. It was that this fixation (with plumbing, telephone and electricity permanently affixed from the land) rendered the structure "incapable" of use in transportation. The case did not hold that the structure was not a vessel because it was not actually used for navigation.

Petitioner also cites the case of *Keys Jet Ski, Inc., v. Kays*, 893 F.2d 1225 (11th Cir. 1990), for the proposition that interpreting 1 U.S.C. §3 literally would lead to absurd results — according to the United States Court of Appeals for the Eleventh Circuit. Petition at 15. The Eleventh Circuit absolutely did not say this, did not "note" this and did not hold this. This is absolutely untrue. In *Keys Jet Ski* the court applied 1 U.S.C. §3 to hold that a jet ski *was a vessel* for purposes of the Limitation of Liability Act, 46 U.S.C. §181-188, because it satisfied the capability test. Petitioner's statement is a gross misstatement as to a case *which held exactly the opposite* of what petitioner says about it.

Finally, respondent would like to take this opportunity to dissent from petitioner's scurrilous attack on both the competence and integrity of the Louisiana Supreme Court. Petitioner devotes about a page and a half of its petition to an allegation that the Louisiana Supreme Court cited the wrong case at one point and then corrected the mistake upon the printing of the opinion in the Reporter. Petition at 17-18. There is no indication by the petitioner as to how this transposition of cases affected the decision in any way. The point being made by petitioner has nothing to do with the reasoning or outcome of the case. Apparently, according to petitioner, if a court intends to cite a case for an ab-

solutely correct proposition, but inadvertently refers to another case and later corrects the oversight, then this is a ground to issue a writ of certiorari. It is not grounds for issuance of a writ of certiorari that a court misnames a case, especially when this alleged error has absolutely nothing to do with the result reached in the case. Should this be characterized as a "sloppy attempt to cover up an even sloppier error that goes to the heart of the Court's decision"? Petition at 18.

CONCLUSION

For these reasons, respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

THE LAW OFFICES OF
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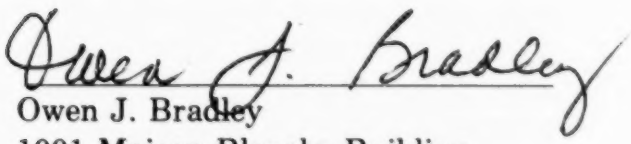

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were served on all counsel of record by placing same in the U.S. Mail, postage prepaid and properly addressed, this 5th day of July 1990.

Drew J. Bradley